

CASE NO.:
Appeal (civil) 1103 of 1998

PETITIONER:
Subhadra Rani Pal Choudhary

RESPONDENT:
Sheirly Weigal Nain & Ors.

DATE OF JUDGMENT: 06/04/2005

BENCH:
ASHOK BHAN & A.K. MATHUR

JUDGMENT:
J U D G M E N T

A.K. MATHUR, J.

This appeal is directed against an order passed by learned Division Bench of Calcutta High Court dated November 26, 1997 in First Appeal No.469 of 1980 whereby the Division Bench of the High Court allowed the application of the Respondent No.1 and directed the appellant to execute the lease deed with regard to premises Nos.21/1/C and 21/1/D, Gora Chand Road, Calcutta-700 014 in terms of the order dated May 5, 1986 within a period of six weeks from the date of order i.e. November 26, 1997 for a period of 21 years commencing from the date of grant of relevant permission by the Court, in default, it would be open to the respondent No.1 to apply before the trial court for execution of the lease. It was further directed that the respondent No.1 was to pay the arrear of occupation charges after adjustment of the amounts already paid by him with regard to the concerned properties and excluding the period of non-possession of the premises No.21/1/C in terms of the letter of offer dated November 12, 1985 within four weeks to the receiver and the trial court may issue necessary directions to the receiver with regard to disbursement of the said amount. Aggrieved against this order, the present appeal was filed by the appellant.

This case involves a very chequered history. There are two properties bearing No.21/1/C and 21/1/D at Gora Chand Road, Calcutta. The said properties initially belonged to one Smt. Hemantabala Roy, the mother of the appellant. She bequeathed the property in favour of her two daughters, Subhadra Rani Pal Choudhary (the appellant herein) and Jyotsnamayee Pal Choudhary since deceased. Both were joint executrix under the will. The will was executed by Smt. Hemantabala Roy in favour of these two daughters on April 2, 1971. The said will was registered on April 12, 1971. Both the sisters moved an application for grant of probate but the brothers of the appellant contested the probate. Therefore, Original Suit No.5 of 1975 was registered. However, probate was granted in favour of the daughters. Thereafter, the brothers of the appellant preferred an appeal before the High Court being First Appeal No.469 of 1980. Pending First appeal, the High Court appointed Smt. Jyotsnamoyee Pal Chowdhary and Smt. Subhadra Rani Pal Chowdhary as administrators \026 cum- joint receivers pendente lite by order dated 27th April 1981. During the pendency of this matter, an application was filed for seeking permission to let out both these premises i.e. Nos.21/1/C and 21/1/D at Gora Chand Road, Calcutta. The Division Bench of the High Court granted permission on April 30, 1985 to proceed and invite offers. Offers were invited by issuing advertisement on November 20, 1985 and an offer was made by Harvard House, Montessori School on November 12, 1985, respondent No.1 was In-charge of the said school. The respondent

No. 1 being the highest bidder; her bid was accepted and Court by order dated May 5, 1986 permitted joint receivers to lease out premises in favour of the respondent No.1. The order dated May 5, 1986 reads as under :

" Heard learned counsel for the parties.

It appears that the offer made by Harvard House, 17 Camac Street, Calcutta-700 017, is the highest. Learned counsel for the opposite parties, appellants also agrees to this.

Leave is accordingly granted to the applicants in terms of prayers (a) and (b) of this application to let out the premises to Harvard House, 17 Camac Street, Calcutta-700 017 for a period of twenty one years on terms contained in the letter of offer dated November 12, 1985 as annexed to the affidavit-in-reply to this application.

This application is disposed of as above."

As a result of this, the offer of respondent No.1 who being the highest bidder was accepted and the rent was fixed at Rs.6500 per month with other conditions. The possession of the premises No.21/1/D, Gora Chand Road, Calcutta was given to respondent No.1 on June 16, 1986 in terms of the offer made by respondent No.1. The respondent No.1 paid a sum of Rs.1,20,000 as security and rent at the rate of Rs.6,500/- per month and Rs.900/- for the maintenance of driving ways and lawns. It was alleged that the respondent No.1 also paid a sum of Rs.10,000/- towards income-tax in respect of premises No.21/1/C. But no possession of the premises No.21/1/C was given to respondent No.1 nor any lease deed was executed in respect of premises No.21/1/D. However, a draft lease deed was sent to the joint receivers but it was not executed on the ground that the respondent No.1 had made illegal construction in the premises No.21/1/D in violation of the clause 6 of the letter of offer. An application was moved by Respondent No.1 before the High Court on 12.5.1987 for direction to the joint receivers to deliver possession of the premises No.21/1/C, Gora Chand Road and to execute the lease deed in respect of both the premises. The said application of the respondent No.1 was dismissed by the Division Bench of the Calcutta (Justice S.P. Das Gosh & Justice L.M. Ghosh) by order dated August 11, 1987. It was held that petitioner had not come with clean hands as applicant had raised illegal construction in premises No. 21/1/D as alleged by joint receivers. Joint receivers were also permitted by the Court on 15.1.1987 to take appropriate legal action against applicant. A suit was also filed against applicant in Sealdah Court. The Division Bench dismissed the application of applicant and declined to grant any relief, either to execute lease for both the premises, i.e., 21/1/D and 21/1/C or permit possession of premises No. 21/1/C. Aggrieved against the said order dated August 11, 1987 respondent No.1. preferred a Special Leave Petition before this Court. Meanwhile, the First Appeal filed in a probate proceeding by the brothers of the appellant was disposed off by the High Court by way of compromise between the parties on October 3, 1988. Respondent No.1 filed T.S.No. 41 of 1989 before learned District Judge, Alipore on May 3, 1989 for specific performance of the agreement arrived at on May 5, 1986 in pursuance of the order passed by the High Court. Then again another application dated 31.3.1989 was moved before the High Court to sue the joint receivers for specific performance of the agreement for granting lease of both the premises. On December 4, 1989 permission to sue the joint receivers in respect of premises No.21/1/D was granted by the High Court. But no order was passed in respect of premises No.21/1/C. Aggrieved against this order the respondent No.1 filed S.L.P.(C) No.7489 of 1990 before this Court. Both the Special Leave Petitions came up before this Court and they were dismissed by order dated January 2, 1995. This Court passed the following order which

reads as under:

" Mr.Jaitley, learned counsel for the petitioner-lessee brings to our notice two circumstances viz. (i) that the suit filed by the Joint-Receiver for modification has since been dismissed for non-prosecution and to the best of the information of his client, there is no application for restoration; and (ii) clause 6 of the offer made by him, which offer has been accepted by the court, does expressly contemplate internal modifications at the expense of the lessee which the landlord was supposed to permit. Shri Jaitley says that the second circumstances was not noticed by the High Court while passing the order impugned in SLP) No.671/88, though it is noticed in the other order which is the subject matter of the SLP) No.7489 of 1990. Shri Jaitley also says that so far as 21/1/C is concerned, possession has not yet been delivered to the petitioner-lessee notwithstanding the fact that the auction was held as far back as 1986. He says that the lessee is suffering prejudice on that account.

We are of the opinion that these are all matters which the High Court, which has appointed the Joint Receivers, and which is supposed to be in custody of the property, should look into. It is open to the petitioner to move the appropriate Division Bench of the High Court for directions bringing to their notice all the relevant facts. We are sure that on such application being filed, it will be dealt with according to law. With these observations the Special Leave Petitions are dismissed."

After this order dated January 2, 1995, present application was moved before the High Court for direction and orders upon the Administrators \026cum- Receivers, that is how the matter came up before the High Court. The High Court in view of the observations made by this Court allowed the application and directed as aforesaid. Aggrieved against this impugned order dated 26th November, 1997 passed by the High Court on application moved by Respondent No. 1 (herein) in First Appeal No.469 of 1980 (disposed of), the Special Leave Petition had been filed by the appellant.

In the meanwhile some developments took place which has no material bearing, but it was brought to our notice that Respondent No. 1 went to America and she divorced her husband who is managing the School. It was also pointed out that after the death of Smt. Jyostnamoyee Pal Choudhary the property had further exchanged hands. But that does not concern us so far as the decision in the present appeal is concerned.

Learned counsel for the appellant submitted that after October 3, 1988 when the appeal was dismissed by way of compromise between the appellant and her brothers who challenged the probate, the appellant became the absolute owner and no direction could be given by the Court as property was no more custodia legis. It was also submitted by the learned counsel that by order dated May 5, 1986, the High Court permitted the appellant to lease out the property, it was only permission sought by joint receiver. The lease deed was not executed under the orders of Court. Therefore, the order dated May 5, 1986 is not capable of being enforced as the order of the High Court. It was also submitted that by order dated August 11, 1987 the High Court had overruled the contention of the respondent No.1 for enforcement of the order dated May 5, 1986 of the High Court to execute the lease deed for both premises. This

order was reaffirmed by subsequent order dated 4th December, 1989 by Division Bench and no direction was given for executing the lease deed in favour of respondent No.1 for premises No. 21/1/C because of conduct of Respondent No. 1 for raising illegal construction contrary to the terms and conditions of the letter of offer. It was also submitted that S.L.Ps. were filed against both these orders, both orders have been maintained by Apex Court and S.L.Ps. were dismissed.

It was also pointed out that it was not brought to notice of this Court while SLPs were argued that meanwhile appeal pending before the High Court had been disposed of. SLPs were rejected ex parte and no notice was given to appellants.

As against this learned counsel for the respondent No.1 pointed out that as per order dated May 5, 1986 the appellant was under obligation to execute the lease deed for both the premises. It was also pointed out that the property remained custodia legis till the Court released both the executrix as joint receivers, they continue to hold the property in trust on behalf of Court. It was also contended that the High Court directed by order dated August 11, 1987 to joint receiver to file a suit for illegal construction against Respondent No. 1 but that suit was not prosecuted and it was dismissed in default. Therefore, the ground of illegal construction does not survive. It was further contended that by not executing the lease deed for the premises No. 21/1/C, the respondent suffered as she could not acquire premises for accommodating more students, therefore, the respondent is entitled to damages. It was also contended that as per the direction of this Court an application was moved by the respondent herein and the Division Bench had rightly approached the matter and directed appellant to grant lease for both the premises in terms of the order dated May 5, 1986.

So far as the first question raised by the learned counsel for appellant that once appeal preferred by the brothers of the appellant challenging the grant of probate is dismissed on October 3, 1988, all the applications or pending matters come to an end, appears to be justified. Once the appeal stood dismissed then the property stood vested with the sisters. In this connection, our attention was invited to Sections 211, 227 and 247 of the Indian Succession Act, 1925. The said sections are reproduced below:

" 211. Character and property of executor or administrator as such.- (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

227. Effect of probate- Probate of a will when granted establishes the will from the death of the testator, and renders valid all intermediate acts of the executor as such.

247. Administration, pendente lite, - Pending any suit touching the validity of the will of a deceased person or for obtaining or revoking any probate or any grant of letters of administration the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such

administrator shall be subject to the immediate control of the Court and shall act under its direction."

According to Section 211, an executor or administrator of a deceased person is legal representative for all purposes and all the property of the deceased person vests in him. This Section lays down that when there is an executor or administrator of the deceased, he is the legal representative of the deceased for all purposes and all the property vests in him. Section 227 says that after the probate of the will is granted then it becomes effective from the death of the testator and shall render valid all intermediate acts of the executor as such. Therefore, according to Section 227, the moment the probate is granted it will relate back from the date of death of the testator and all property will be vested in the person in whose favour the probate was granted. Section 247 only lays down that administrator can be appointed pendente lite i.e. the Court can appoint administrator who shall have all the rights and powers of a general administrator other than the right of distributing such estate and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

In this connection, learned counsel for the appellant invited our attention to a decision of the Calcutta High Court in the case of Gopal Lal Chandra vs. Amulyakumar Sur reported in AIR 1933 Calcutta 234. It was held by the Calcutta High Court as under :

" The view adopted by the Calcutta High Court in respect of wills after 1870 is that, on the executors obtaining probate, they immediately become vested by force of statute with the whole of the estate, which belong to the testator at the time of his death."

Learned counsel for the appellant also invited our attention to another decision of the Calcutta High Court in the case of Bajranglal Khemka & ors. vs. Sm. Sheila Devi & Ors reported in Vol.74 Calcutta Weekly Notes 444. In this case, the question was that what is the powers of the administrators pendente lite and it was observed that the property of the deceased vests with the administrator and any application moved by the petitioner pro interesse suo and stranger to the action, if aggrieved by the conduct of the general administrator whether he has a right to obtain redress in an action at law, it was observed that such application is maintainable against the administrator pendente lite on the original side. But the question with regard to the title of the property cannot be decided. It was observed that as per the Original Side Rules specified class of persons can apply and the relief can be asked for by such applicant. But it was observed that these Rules or the principles underlying them cannot be invoked by the petitioner whose application is directed against joint administrators pendente lite.

As against this, learned counsel for the respondent placed reliance on a decision of this Court in the case of Hiralal Patni vs. Loonkaran Sethiya reported in AIR 1962 SC 21 wherein it was held that receivers can be continued under orders of court even after disposal of the matter.

Learned counsel for the respondent has also invited our attention to another decision of this Court in the case of Kunhayammed & Ors. vs. State of Kerala & Anr. reported in (2000) 6 SCC 359 and contended that by virtue of doctrine of merger the order of the High Court stood merged with the order of the Apex Court. Learned counsel for the respondent also invited our attention to another decision of this Court in the case of Late Nawab Sir Mir Osman Ali Khan vs. Commissioner of Wealth Tax, Hyderabad reported in 1986 (Supp.) SCC 700 wherein their Lordships have held

that dismissal of Special Leave Petition cannot be constructed as affirmation by Supreme Court of the decision from which special leave was sought for. Learned counsel for the respondent further invited our attention to the observation from the Law Relating to Receivers by Sir John Woodroffe at pg.83 which reads as under :

" When the Court orders a receiver to enter into a contract the contract is made with the Court, the approval by the Judge of the offer made by the third party constituting the contract. Such party may apply on summons that the contract may be given effect to. It is not necessary that in order to enforce his right, he should institute a suit. A Court has complete power to enforce summarily a contract made by it when managing or administering an estate, whatever that contract may be. Such power of enforcing subsisting contracts made by it is not affected by the fact that the Court has ceased to manage the estate before such contract is carried out by reason of the dismissal of the suit."

In order to answer this question, we have to first decide whether the order dated 5th May, 1986 passed by the High Court amounts to grant of lease in favour of Respondent No. 1 or not? A perusal of the order dated 5th May, 1986 makes it clear that the Court permitted the appellant to enter into lease agreement with the respondent. Since both Subhadra Rani Pal Choudhary and Jyotsnamoyee Pal Choudhary were appointed as Joint Receivers, an application was filed by them seeking permission from the Court to lease out premises because the property had liabilities to discharge. The Court only permitted the parties to enter into the lease agreement and, the lease agreement was entered between the parties. The Court only granted leave to the applicants in terms of prayer "a" & "b" to let out the premises to Harvard House, for a period of 21 years as per the terms and conditions in the letter of offer dated November 12, 1985. Therefore, it was not an order of the Court to lease out the property but only permission was granted to the Joint Receivers to proceed with the lease agreement of the scheduled property.

It was not the direction of the Court that the appellant shall enter into lease agreement. It was only a permission and that cannot be treated as an order of the Court, as if, that Court had leased out the premises. Therefore, this should be made clear that the lease agreement was entered into by the Joint Receivers with the permission of the Court because the scheduled property was subject matter of the first appeal. Once the first appeal is dismissed then property no more remain custodia legis and joint receivers stand discharged. In this connection reference may be made to a decision of this Court reported in AIR 1962 Supreme Court 21 (V 49 C4) [Hiralal Patni Vs. Loonkaran Sethiya and Ors.] in which it was observed as under:

"Civil P.C. (1908), S.51 (d), O.40, R.1 \026 Appointment of receiver in suit \026 Duration of appointment \026 Rules as to.

Neither S.51(d) nor Order 40 of the Code of Civil Procedure prescribes for the termination of the office of receivership. The law on the point may briefly be stated thus: (1) If a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the action. (2) If a receiver is appointed in a suit, without his tenure being expressly defined, he will continue to be

receiver till he is discharged. (3) But, after the final disposal of the suit as between the parties to the litigation, the receiver's functions are terminated, he would still be answerable to the court as its officer till he is finally discharged. (4) The court has ample power to continue the receiver even after the final decree. If the exigencies of the case so require.

Held on facts, that the Receivers continued by the preliminary decree are entitled to function in that capacity till they are discharged, even though a final decree for the sale of the properties of the defendants was passed."

This Court has summarized the legal position. So far as the appointment of receiver is concerned, it was clearly laid down that the receiver's appointment is co-terminus with suit/appeal and if suit or appeal is disposed of then the appointment is brought to an end. But at the same time the court has a power to continue the receiver after the final decree, if the exigencies of the case so require. But in the present case, as mentioned above, the appeal was dismissed on October 3, 1988 and Court did not reserve any power to continue the receivers. The Court categorically mentioned that this disposes of all the pending applications. The Division Bench while dismissing the main appeal made following observation:

"On the disposal of this appeal, all pending applications, if any shall also be deemed to have been disposed of."

Therefore, so far as the High Court is concerned, High Court completely disposed of the matter and had no jurisdiction to pass any order on the subsequent application filed by the parties. Thus, in this view of the matter, we are of the opinion that the order passed by the High Court in purported observation by this Court which was made in ignorance of the fact that the appeal had been disposed of, the High Court would not acquire any jurisdiction to pass any order. The High Court at the relevant time had no jurisdiction to pass the order when the matter had already been disposed of by it. Therefore, the order passed by the High Court cannot be sustained.

The next question is what is the effect of two orders passed by the High Court. One of the scheduled properties i.e. Premises No. 21/1/D was given by the Joint Receivers to the respondent and possession thereof was handed over to them on 16th June, 1986. The respondent no. 1 made certain construction therein and, therefore, joint receivers moved the High Court for appropriate action in the matter, the respondent No. 1 also moved the High Court for direction, for possession of premises 21/1/C and to execute lease deed for premises 21/1/D and 21/1/C. That matter was disposed of by the Division Bench of the High Court on 11th August, 1987 and in that the Division Bench passed a detailed order not to offer the possession of the premises bearing No. 21/1/C or execution of lease for both premises looking to her conduct as the joint receivers moved the Division Bench that the respondent No. 1 was guilty of illegal construction. Though Court earlier directed joint receiver to file suit against respondent No. 1 for illegal construction by Order dated 15.1.1987. Suit No. 63 of 1987 was filed for declaration and injunction against the Respondent No. 1 in the Court of 3rd Munsif, Sealdah.

However, this was not pursued further by the appellant and it came to be dismissed for default. Thereafter another

application was moved by the respondent No. 1 before the Division Bench on 31ST March, 1989 seeking leave to sue joint receivers and reiterating all facts as mentioned in their application dated May 12, 1987 which was disposed of on 11th August, 1987.

The Division Bench after hearing both the parties at length observed that there is an allegation by the Joint Receivers for illegal construction in premises No. 21/1/D of which possession was delivered to Respondent No.1 on 16th June, 1986 for which the Court has already passed the order on 15th January, 1987 to take legal action against the Harvard House, Respondent No. 1 herein for violation of terms of lease with regard to illegal construction on the premises No. 21/1/D and a suit was filed. The Division Bench held that in order to get a specific relief, the applicant had to come with clean hands and since the applicant had not sought permission for undertaking internal modification, therefore, they have lost the equity in their favour. It was also observed that meanwhile, an application was already moved on 22nd July, 1989 for variation and modification of Court's order dated May 5, 1986 and that was pending and it would be open for the Division Bench to pass an appropriate order either to vary the order dated 5th May, 1986 or not. But it was observed that looking to the conduct of the respondent it would not be appropriate to give a direction to execute the lease deed for Premises No. 21/1/C or to deliver possession to the applicant. Therefore, that prayer was rejected. So far as the recovery of sum of Rs. 1,20,000/- as security for execution of the lease deed in respect of premises No. 21/1/D and also a cheque for a sum of Rs. 10,000/- sent to the Estate Duty Department for execution of lease deed in respect of premises No. 21/1/C, the Division Bench directed that in the absence of any specific prayer by the applicant for the refund of those amounts it would not be proper for the Court to pass any order. However, the Court observed that since the parties already moved the court for modification of order dated 5th May, 1986 on 22nd July, 1987 the applicant would not be left without any remedy regarding these amounts on the analogy of the principles in Section 22(2) of the Specific Relief Act, 1963 and accordingly, the Division Bench declined to grant any relief in this application. However, the Division Bench took into consideration that the respondent herein has already filed a suit in the Civil Court on May 3, 1989 praying for specific performance of the agreement for lease, the leave to sue the Joint Receivers was necessary, therefore, after hearing the parties observed that the dismissal of the application of the Respondent No. 1 herein on 11th August, 1987 would not pose any impediment to grant leave to sue the Joint Receiver-cum- Administrators in respect of Premises No. 21/1/D for a suit pending between the parties. But it was made clear that the Court had not gone into the merits of the respective contention that whether despite the violation of the term No.6 in the letter of offer dated November 12, 1985 the applicant could maintain a suit for specific performance of the contract. The relevant portion reads as under:-

"Regard being had to the facts and circumstances of the present case, even though the Courts rejected the application for proper direction upon the Administrator Pendente lite - cum-Receivers dated 12.5.1997 by its order dated 11.8.1987 we do not find any legal impediment to our granting to the applicant leave to sue the Joint Receivers-cum- Administrator Pendente lite in respect of premises No. 21/1/D Gorachand Road, Calcutta

for which already a suit is pending in between the parties, even though we make it clear that we have not really gone into the merits of the respective contentions as made by the applicant on the one hand and the contending parties on the other as to whether despite the violation of the term no. 6 in the letter of offer dated 12.11.1985 the applicant can still maintain a suit for specific performance of the contract."

So far as the Premises No. 21/1/C is concerned, the Court found that since the request of the applicant (respondent therein) was rejected by the Division Bench on 11th August, 1987 and against that Order the applicant had already approached the Apex Court and the same has not been disposed of, the Court declined to interfere and rejected the application. Aggrieved against this order, another Special Leave Petition was also filed.

Now, in the light of these two orders passed by the Division Bench, it clearly shows that so far as the request of the applicant to execute the lease deed with regard to Premises No. 21/1/D is concerned, the Court has already granted permission to the applicant (respondent No. 1 herein) to prosecute its suit filed before the Court for execution of the lease deed of the aforesaid premises, but declined to grant any relief for the premises No. 21/1/C. Therefore, the prayer of Respondent No. 1 for Specific performance of order to execute the lease for premises No. 21/1/C failed and subsequently Division Bench cannot sit over the matter and review it. The SLPs filed against both the orders dated 11th August, 1987 and 4th December, 1987 were also dismissed on 2nd January, 1995, the result was that both the orders stood affirmed, though some observations were made by this Court while dismissing S.L.Ps. without any notice to appellant (herein). More so, all the material facts were not brought to the notice of this Court, that meanwhile the first appeal out of which all the litigations arose had already stood disposed of by way of compromise on 3rd October, 1988. However, this Court made observation under the impression that the first appeal was still pending. Had this fact been brought to the notice of the Court perhaps these observations would not have been made.

However, after the disposal of both the special leave petitions by the Order dated 2.1.1995, an application by the respondent No.1 herein before the Division Bench of Calcutta High Court inspired by the observation of this Court was not warranted. The important fact was suppressed from this court that meanwhile appeal had been dismissed and property was no more custodia legis. Yet it was contended before this Court that since the suit filed for illegal construction had been dismissed for non-prosecution and no application for restoration of the suit has been moved, as per Clause 6 (ii) of the Offer letter which was accepted by the Court expressly contemplated the internal modification at the expense of lessee which landlord was supposed to permit, these contentions were noted by this Court while dismissing the S.L.Ps.

After this, present application was filed by respondent No.1 before the High Court as aforesaid.

In this background the argument of learned counsel for appellant deserves to be accepted. After the dismissal of first appeal by the High Court, property stood vested with both sisters and they became absolute owner and property no more remain custodia legis. The appointment of Joint Receiver

came to an end and they stood discharged. As such, there was no need for the Division Bench to consider the application filed by the applicant (respondent herein). In fact, while the order was passed by this Court on 2nd January, 1995 it was not brought to the notice of this Court that the property was no more custodia legis as on that date the appeal filed by the brothers of the appellant had already been dismissed by way of compromise. It was clearly mentioned in the order dated October 3, 1988, as quoted above, "while disposing the first appeal that all the applications stand disposed of" meaning thereby, that at that time no matter was pending in the High Court and the order passed by the Division Bench was without jurisdiction. It is true that this Court on January 2, 1995 under the bona fide impression gave liberty to the applicant to move the Calcutta High Court for appropriate relief. But the net result is that both these Special Leave Petitions were dismissed by this Court and no positive direction was passed by this Court. It was only the observation leaving the respondent No.1 to seek an appropriate remedy before the Division Bench of the High Court if permissible under the law. But at the time when this application was moved for appropriate direction before the Calcutta High Court, the Calcutta High Court was no more seized with the matter, as the first appeal filed before the Calcutta High Court had already stood disposed of on 3rd October, 1988. Therefore, the property was neither custodia legis nor was the High Court competent to pass the impugned order. In fact by taking recourse to the observation made by this Court while dismissing the Special Leave Petitions, the respondent No.1 felt encouraged to move the High Court and obtained a direction which the High Court was not competent to issue as the property in question was no more custodia legis.

However, we cannot be oblivious of equity created in favour of Respondent No. 1. The equity requires in the matter that the Court permitted Joint Receivers to enter into a lease with the respondent No.1, it would be unfair to leave the respondent No.1 high and dry at this distance of time. The Division Bench by its order dated 4th December, 1988 did not grant any relief except to sue the joint receiver for execution of the lease deed with regard to the premises No. 21/1/D but denied the possession of the premises No. 21/1/C or execution of lease deed for this property. Therefore, we are not inclined to pass any order with regard to the possession or execution of lease for Premises No. 21/1/C and set aside the order of High Court. But so far as Premises No. 21/1/D is concerned, though no lease was executed but possession was handed over to the respondent No. 1 herein on 16th June, 1986 and they are in possession since then. Therefore, we direct that the appellant shall execute the lease deed for remaining period of the 21 years of lease from 16th June, 1986 on same terms and conditions as contained in offer letter dated 12th November, 1985 and the respondent shall pay arrears of rent, if not paid so far and all other money in terms of the Offer dated 12th November, 1985 within one month of the receipt of this Order. In case, the respondent fails to pay, it will be open for the appellant to proceed against the respondent No. 1 in accordance with law. The appellant shall refund sum of Rs. 10,000/- paid by respondent No. 1 towards duty for premises No. 21/1/C or adjust against dues, if any.

The learned counsel submitted that the order of High Court stood merged with that of the order of this Court, In this connection reference may be made to decisions of this Court Kunhayammed and Ors. Vs. State of Kerala and Anr. reported in (2000) 6 SCC 359, Indian Oil Corporation Ltd. vs. State of Bihar reported in (1986) 4 SCC 146, Union of India Vs. All

India Services Pensioners' Association and Another reported in (1988) 2 SCC 580, Supreme Court Employees' Welfare Association Vs. Union of India and Anrs. Reported in (1989) 4 SCC 187, Commissioner of Income Tax, Bangalore Vs. Shree Majunatheaware Packing Products & Camphor Works, reported in (1998) 1 SCC 598 and P. Nallammal and Anr. Vs. State Represented by Inspector of Police reported in (1999) 6, SCC 559. The principle of merger is not applicable to the present case as both the Special Leave Petitions filed by the respondent No.1 were dismissed by this Court and, therefore, the orders passed by the Division Bench of Calcutta dated 11th August, 1987 and 4th December, 1988 did not stand merge with the order of the Apex Court dated 2.1.1995. The dismissal in limine does not amount to upholding of the law propounded in the decision sought to be appealed against.

It was also contended that the respondent No.1 has suffered damages because the premises No. 21/1/C was not given to Respondent No. 1 and Respondent No. 1 could not provide more accommodation to admit number of students and suffered loss. She invited our attention to Section 21 of Specific Relief Act, and contended that damages should be granted. This argument is devoid of any merit as we have already held above that Respondent No. 1 has no case to seek specific relief for premises no. 21/1/C, therefore, there is no case made out for damages. Hence, this appeal is accordingly disposed of with no order as to costs.